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Supreme Court, U.S.
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No.____-_____

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOSEPH NICHOLAS ALAGO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTION PRESENTED

Does the Government's refusal to move for a downward departure, pursuant to Sentencing Guidelines Rule 5K1.1, after petitioner's conviction by jury trial, constitute a bad faith refusal, where, pretrial, the Government offered to make such a motion based upon substantial assistance, in exchange for petitioner's guilty plea.

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Petitioner, Joseph Nicholas Alago, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit, which affirmed the judgment of the District Court, holding that the Government's refusal to move for a downward departure at sentencing pursuant

to Sentencing Guidelines Rule 5K1.1 was not done in bad faith, so as to punish petitioner for his exercise of his right to jury trial.

OPINION BELOW

The opinion of which review is sought in this Court is an unpublished opinion of the Court of Appeals for the Ninth Circuit, filed on January 26, 1994. The entire opinion is attached as the Appendix to this petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 USC section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

2. Federal Sentencing Guidelines Manual, section 5K1.1:

"Upon motion of the government stating that the defendant has provided substantial assistance in the investigaton or prosecution of another person who has committed an offense, the court may depart from the guidelines."

3. Federal Sentencing Guidelines Manual, section 3E1.1:

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease

the offense level by 2 levels. (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:(1) timely providing complete information to the government concerning his own involvement in the offense; or (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease the offense level by 1 additional level."

STATEMENT OF THE CASE

Petitioner was charged in a three count Indictment with conspiracy to manufacture methamphetamine, attempted

manufacture of methamphetamine, and possession of a listed chemical. Before trial, the prosecutor offered to allow petitioner to plead guilty to possession of a listed chemical, in exchange for dismissal of the conspiracy and attempt counts. Additionally, the prosecutor agreed to allow defendant offense level reductions for acceptance of responsibility, and to move for reduction for substantial assistance pursuant to Sentencing Guidelines section 5K1.1, for assistance petitioner had provided in the apprehension of a co-defendant who had pleaded guilty.

Petitioner rejected the offer and exercised his right to jury trial. Petitioner was convicted of possession of a listed chemial, and the jury was unable to reach verdicts as to the conspiracy and attempt counts. These counts were ultimately dismissed by the Government.

At sentencing, the Government declined to move for downward departure pursuant to Rule 5K1.1. Petitioner moved the District Court pursuant to Wade v. United States, ___U.S.___, 112 S.Ct. 1840 (1992), to find the Government's motive in not making the motion to be in bad faith and as punishing petitioner for exercising his right to jury trial. The District Court declined to so find, and the Court of Appeal affirmed the ruling of the District Court.

ARGUMENT FOR THE WRIT

At no time during the development of this case has the Government denied that in fact the pretrial offer in settlement as represented by petitioner was made. By no stretch of the imagination is petitioner seeking to enforce the terms of a rejected offer. By way of this petition, he is seeking credit, which, but for the exercise of his right to jury trial, he would have received, based on

substantial assistance performed prior to the offer being made. Simply put, if petitioner gave substantial assistance, thereby prompting the offer, then the District Court should have the obligation to consider whether, and to what extent downward departure is warranted, giving consideration to the factors set out in Rule 5K1.1. If no substantial assistance was provided, then the Government should not have made the offer. If petitioner's assistance was not complete, as the Government represented to the District Court, and upon which the Court of Appeal placed reliance, then why, pretrial did the Government intimate that it was, which is the only conclusion that can be drawn from the making of the offer?

Rule 5K1.1 was not intended as a vehicle for inducing guilty pleas as is made clear by Application Note 2 to

the Commentary. Presumably the Government did not tender the offer lightly, simply as an added inducement to settle the case. Rather, it did so to give some consideration for the effort already put forward by petitioner.

From the time that the Government apparently concluded that petitioner had provided substantial assistance, prompting its offer, to the time of petitioner's sentencing, when the Government had "second thoughts," the only factor that changed was petitioner's exercise of his Sixth Amendment rights. The individual who was the target of the assistance had already pleaded guilty and been sentenced.

The Court of Appeal concluded that the District Court found petitioner's testimony not credible. The opinion does not discuss whether the District Court was referring to the trial testimony or

representations concerning the proposed settlement agreement. The District Court's statements concerning petitioner's credibility were more in the nature of observations than "findings," and as has been previously stated, the making of the offer pretrial has never been denied. If the District Court felt that petitioner was lying at trial, then this factor could be considered in application of the factors in determining to what extent, if any, there should be a departure, once the motion is made under Rule 5K1.1. Petitioner's credibilty at trial has no bearing on whether the Government made the offer pretrial, based on substantial assistance, and then, after petitioner exercised his right to jury trial "changed its mind," as to the value of the assistance.

To allow the Government to manipulate use of the Sentencing Guidelines in such fashion serves no legitimate state interest,

particularly where a right so valuable as jury trial is implicated and compromised.

CONCLUSION

Based on the foregoing, petitioner respectfully urges this Court to issue its writ to review the prosecutorial practice demonstrated herein for abuse of its discretion.

Dated: April 25, 1994

Respectfully submitted,

_____

Joseph Nicholas Alago
Petitioner
In Pro se

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No.93-50223
-vs-	)	D.C. No. 91-526-3-JSR
RONALD ALLEN KEMPER, Defendant-Appellant	)	

Appeal from the United States District Court for the Southern District of California

John S. Rhoades, District Judge, Presiding

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 93-50272
-vs-	)	D.C. No. CR-5260-1-JNK
JOSEPH NICHOLAS ALAGO, Defendant-Appellant	)	MEMORANDUM

Appeal from the United States District Court for the Southern District of California

Judith N. Keep, Chief Judge, Presiding

Submitted January 5, 1994

Pasadena, California

Before: GOODWIN and HALL, Circuit Judges;

TANNER, Senior District Judge

Background

Ronald Kemper appeals his sentence under the Sentencing Guidelines imposed following his guilty plea to conspiracy to manufacture methamphetamine, in violation of 21 U.S.C. sections 846 and 841(a)(1). Joseph Alago appeals his jury conviction for wrongful possession of a listed chemical in violation of 21 U.S.C. sections 841(d)(2), 802(33) and 802(34)(C). Jurisdiction in the district court was pursuant to 18 U.S.C. section 3231. We have jurisdiction purusant to 28 U.S.C. section 1291.

We address each appellant's arguments in turn.

A. Ronald Kemper

On appeal, Kemper challenges the district court's denial of his request for a

two-point reduction for acceptance of responsibility pursuant to United States Sentencing Guidelines (hereafter U.S.S.G.) section 3E1.1(a).

The district court's determination that Kemper did not accept responsibility is reviewed for clear error. United States v. Gonzales, 897 F.2d 1018, 1019 (9th Cir. 1990).

Section 3E1.1(a) of the Guidelines provides as follows:

(a) if the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by two levels.[1/]

We reject Kemper's argument that the court failed to articulate a specific reason for denying acceptance in this case. In articulating its reasons for the denial, the court stated that Kemper did not accept

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1. The 1990 edition of the Guidelines was utilized in this case.

responsibility, and that Kemper's repeated criminal conduct indicated lack of remorsefulness. Defendant's attempt to separate a consideration of "remorse" from any discussion of acceptance of responsibility is unpersuasive. Appellant's counsel first made reference to "remorse" in his remarks by characterizing the situation as one "where he has come forward and accepted responsibility, shown appropriate remorse." (ECR 51; RT 12) 2/

The government argued that Kemper had not voluntarily terminated his criminal conduct and instead turned around and committed the same type of crime. (ECR 52).

The Commentary Notes to section 3E1.1 provide that one of the appropriate considerations for determining whether a

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2. The Guidelines themselves make reference to the concept of remorse in Application Note 2. The notes indicate that an adjustment for acceptance is not intended to apply to a defendant who goes to trial, is convicted, and only then admits guilt and expresses "remorse."

defendant qualifies for an adjustment for acceptance is whether there has been "voluntary" termination or withdrawal from criminal conduct or associations." U.S.S.G. section 3E1.1, Application Note 1(a).

The district court specifically relied on this provision in denying an adjustment for acceptance of responsibility,[3/] noting that defendant had engaged in additional criminal conduct after his entry of plea.

The Ninth Circuit has held that a district court may consider evidence of a defendant's continued criminal conduct to belie defendant's protestations of remorse and acceptance for the offense of conviction. United States v. Cooper, 912 F.2d 344, 348 (9th Cir. 1990).

A reviewing court should give "great deference" to a lower court's conclusion

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3. The court stated: "I will find that he has not accepted responsibility pursuant to 3E1.1, Application Note (1)(a)."

regarding a finding of acceptance, disturbing it on appeal only if it is "without foundation." United States v. Gonzalez, 897 F.2d 1018, 1019 (9th Cir. 1990) (citing U.S.S.G. section 3E1.1 comment. (n.5)).

We find that the district court's determination that Kemper is not entitled to a 2-point reduction for acceptance of responsibility is not clearly erroneous. We AFFIRM.

B. Joseph Alago

Motion In Limine under Fed. R.Evid. 404(b)

Prior to trial, defendant Alago sought by motion in limine to exclude testimony relating to prior cocaine transactions involving defendant and Jay Lennett occurring between March and May 1991. The government opposed the motion, arguing that the evidence was admissible under Federal Rules of Evidence 404(b) on the issue of intent and knowledge. The government

argued alternatively that the evidence of prior cocaine dealing was inextricably intertwined with the contemporaneous criminal activities of the two men which resulted in their arrest. The trial court denied the motion, ruling that the evidence was relevant on the issue of knowledge.

Admission or exclusion of evidence is reviewed on appeal for an abuse of discretion. United States v. Crespo de Llano, 830 F.2d 1532, 1546 (9th Cir. 1987); United States v. Miller, 874 F.2d 1255, 1260 (9th Cir. 1989). Evidence of other crimes or acts relevant to an issue at trial is admissible unless it tends to prove only criminal disposition. United States v. McKoy, 771 F.2d 1207, 1213 (9th Cir. 1985).

Evidence of prior bad acts can be admitted to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Fed. R. Evid. 404(b), See United States

v.Houser, 929 F.2d 1369, 1373 (9th Cir. 1990).

The Ninth Circuit has articulated a four-part test to determine admissibility of evidence pursuant to 404(b):

(1) there must be sufficient evidence to support a finding by the jury that the defendant committed the other act;[4/]

(2) the crimes or acts must not be too remote;

(3) the prior conduct must in some cases be similar to the acts defendant is charged with; and

(4) the evidence must prove an essential element of the offense. United States v. Houser, 929 F.2d 1369, 1373 (9th Cir. 1990), citing United States v. Miller, 874 F.2d 1255, 1268, reh'g denied, 884 F.2d 1149 (9th Cir. 1989).

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4. The "clear and convincing" standard previously articulated in United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982), was replaced by the more lenient "sufficient evidence" rule in Huddleston v. United States, ___ U.S. ___, 108 S.Ct. 1496, 1499 (1988).

In this case, proof of the prior bad act is in the form of the testimony of co-defendant Jay Lennett, who was directly involved in the cocaine dealings with Alago. The acts occurred contemporaneously with Alago's ephedrine activities, and so are not too remote. The other acts involved cocaine dealing, while the charges of which defendant was convicted involved wrongful possession of a listed (precursor) chemical. Similarity, however, is not always required. United States v. Arambula-Ruiz, 987 F.2d 599, 603 (9th Cir. 1993).

When offered to prove knowledge, the prior act need not be similar to the charged act as long as the prior act was one which would tend to make the existence of the defendant's knowledge more probable than it would be without the evidence. Id., citing United States v. Ramirez-Jimenez, 967 F.2d 1321, 1326 (9th Cir. 1992). In this case, the district court admitted the evidence for the purpose of

showing knowledge.

Finally, the other acts were relevant to show whether defendant possessed the ephedrine "knowing or having reason to believe" it would be used to manufacture methamphetamine. 21 U.S.C. section 841(d)(2). It was logical for the jury to infer the requisite knowledge on the part of Alago because he was dealing with an individual whom he had previously been involved with in drug trafficking.[5/] The evidence is admissible under Rule 404(b).

Balancing Test under Red.R. Evid. 403.

Federal Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

A district court decision balancing

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5. The government argues that the prior drug offense tended to prove intent and knowledge. The trial court, however, admitted the testimony only on the basis of knowledge.

probative versus prejudicial value under Fed.R.Evid. 403 is reviewed for abuse of discretion. United States v. Houser, 929 F.2d at 1369, 1373, citing United States v. Feldman, 788 F.2d 544, 557 (9th Cir. 1986).

The evidence is probative of Alago's knowledge of what the ephedrine was to be used for. Alago was aware of Lennett's dealing in drugs, had dealt drugs with him in the past, and neither Alago nor Lennett has a pharmaceutical background. Balancing the probative value against its prejudicial effect, we find that the district court did not abuse its discretion in admitting this evidence. The district court also properly instructed the jury on the limited purpose for which the evidence was admitted.

Downward Departure

Appellant argues that the district court erred in refusing to make a motion for downward departure due to substantial assistance to authorities pursuant to United

States Sentencing Guidelines section 5K1.1 solely because he exercised his right to a jury trial.

The Supreme Court has held that while section 5K1.1 gives the government the power to depart, it does not create a duty to file a motion when a defendant has provided substantial assistance. Wade v. United States, ___U.S.___, 112 S.Ct. 1840, 1843 (1992).

Alago claims that the government acted in bad faith in refusing to make a motion for downward departure under Guidelines section 5K1.1.

Federal district courts have authority to review a prosecutor's refusal to file a substantial assistance motion and to grant a remedy if the refusal was based on an unconstitutional motice, or if refusal was not rationally related to any legitimate state objective. Wade v. United States, 112 S.Ct. at 1843-44.

The government stated unequivocably that the defendant's cooperation did not amount to substantial assistance, and was in fact, incomplete. The district court found defendant's testimony not credible, and rejected defendant's claim that the government acted in bad faith.

We do not find the trial court's decision to be clearly erroneous.

AFFIRMED.